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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/715,430	11/19/2003	Michael K. McInerney	COE-566	5350
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HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY ATTN: CEHEC-OC 7701 TELEGRAPH ROAD ALEXANDRIA, VA 22315-3860			SPAHN, GAY	
			ART UNIT	PAPER NUMBER
			3673	

DATE MAILED: 10/20/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/715,430	MCINERNEY ET AL.	
Examiner	Art Unit		
Gay Ann Spahn	3673		

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 27 June 2005.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-35 is/are pending in the application.
4a) Of the above claim(s) 10, 11, and 13-35 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-9 and 12 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 19 November 2003 is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
5) Notice of Informal Patent Application (PTO-152)
6) Other: _____

DETAILED ACTION

Election/Restrictions

Applicant's election with traverse of Group I, claims 1-15 and the species of one plate/foil, the species of metal, the species of applying pressure, and the species of Fig. 5 in the reply filed on 27 June 2005 is acknowledged.

The traversal is on the grounds that using the process of claims 1-15, one can use only the apparatus of claims 16-35 to yield the desired result, i.e., a structure that does not transfer moisture in an undesirable direction.

This is not found persuasive because as stated in the restriction requirement, the claimed configuration for implementing a barrier to fluid flow in at least one direction can be made by another and materially different process, such as one in which the adhesive is applied to the non-porous material prior to the placing of the non-porous material upon the first section.

The traversal is also on the grounds that examining all of the claimed inventions in claims 1-35 in a single application will not create a serious burden on the USPTO because the same research suffices for both the method claimed and the apparatus and because the applicant has a statutory right to claim an invention as he/she sees fit according to *In re Weber*, 580 F.2d at 458, 198 USPQ at 332.

This is not found persuasive because claims 1-15 are drawn to a method of implementing a barrier to fluid passage in at least one direction which is classified in class 52, subclass 744.1 and claims 16-35 are drawn to a configuration implementing a

barrier to fluid passage in at least one direction, classified in class 52, subclass 411, which demonstrates that there is a different search for the method versus the apparatus.

The requirement is still deemed proper and is therefore made FINAL.

Claim 16-35 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim.

Claims 10, 11, and 13-15 are withdrawn from consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species (i.e., claims 10, 11, 13, and 14 are drawn to a non-elected species of two plates or foils and claim 15 is drawn to the non-elected species of Fig. 4).

Drawings

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they include the following reference characters not mentioned in the description: reference numeral "602" shown in Fig. 6A and reference numeral "620" shown in Fig. 6B. Corrected drawing sheets in compliance with 37 CFR 1.121(d), or amendment to the specification to add the reference character(s) in the description in compliance with 37 CFR 1.121(b) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of

an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Specification

The use of the trademark Gortex® has been noted in this application (on page 4, lines 25 and 28). It should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-9 and 12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1, the recitation of "any said panels placed adjacent thereto" in lines 9-10, the recitation of "said panels" in line 11, the recitation of "all said overlapped edges" in line 13, both recitations of "each said panel" in line 15, the recitation of "said panels" in

line 17, and the recitation of "said overlapped edges of said panels" in lines 17-18, all lack antecedent basis because a second panel has not been introduced. Therefore, the examiner suggests amending the recitation to read --overlapping an edge of said panel with an edge of a second panel which is placed adjacent to said at least one panel, wherein said panels completely cover said topmost layer of said adhesive material--.

Claim 1, lines 8-9, the recitation of "said at least one layers of an adhesive material" is confusing and indefinite. For proper antecedent basis, it should be at least one --layer-- (i.e., not "layers"). Further, the word "an" should be deleted since the "at least one layer of adhesive material" has already been introduced in line 4 and the word "an" makes it appear like you are introducing another adhesive material.

Claim 1, line 11, the recitation of "said topmost layer of said adhesive material" is confusing and indefinite because in line 4, "at least one layer of adhesive material" has been introduced which the examiner has taken to mean that there is only a single layer of adhesive that has been positively recited. The recitation of a "topmost layer of said adhesive material" is confusing when only one adhesive layer has been positively recited.

Claim 1, line 17, the recitation of "a seal" lacks antecedent basis and is confusing because "a seal" has already been introduced in line 13 and it is not clear if the "seal" recited in line 17 is the same seal as the "seal" in line 13 or a different seal.

Claim 1, lines 17-19, the recitation of "wherein emplacing said panels, establishing a seal between said overlapped edges of said panels, as appropriate, and emplacing said topmost section completes implementation of said barrier" is confusing

and indefinite because it is not clear if this is part of the invention or not. If the recitation does form part of the invention then it is suggested that applicant amend the recitation to acknowledge that the steps have already been positively recited and that the recitation of such steps in the wherein clause is referring back to the steps already recited and not adding new steps. Therefore, the examiner suggests amending the wherein clause in lines 17-19 to language such as --wherein said step of emplacing said panels, said step of establishing said seal between said overlapped edges of said panels, as appropriate, and said step of emplacing said topmost section completes implementation of said barrier--. Furthermore, the words "as appropriate" should be deleted as indefinite since it makes it ambiguous as to whether the step of establishing a seal is performed or not.

Claim 2, lines 2-4, recites that "said barrier employs non-porous material selected from the group consisting essentially of: a metal, a metal alloy, a steel alloy, a stainless steel, a composite material, a composite material containing at least some metal, and combinations thereof." This appears to be reciting a Markush group, but reciting the Markush group in an improper manner. The examiner suggests amending the recitation to --said barrier employs non-porous material being any one selected from a group consisting of: a metal, a metal alloy, a steel alloy, a stainless steel, a composite material, a composite material containing at least some metal, and combinations thereof--.

Claim 3, line 2, the recitation of "at least in part at least one metal" is confusing and indefinite. The examiner suggests amending the recitation to --at least in part a first metal--.

Claim 4, lines 1-2, recites "in which porous material encompassing said barrier comprises at least in part concrete" which is confusing and indefinite for two reasons. First, since the porous material has already been introduced in claim 1, the claim should state --in which said porous material--. Second, it has never been positively recited that said topmost section is made of a porous material.

Clarification is required.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4 are rejected under 35 U.S.C. 102(b) as being anticipated by

Dahlander (U.S. Patent No. 2,036,123).

As to claim 1, Dahlander discloses a method of implementing a barrier (3) to fluid flow in at least one direction, said barrier (3) embedded within porous material (concrete 1 and flooring 2 (see page 1, second column, wherein the flooring is anyone of wood, rubber, linoleum, cork or the like) incorporating an emplaced topmost section (2) having a topmost surface suitable for use by wheeled traffic, comprising:

applying at least one layer of an adhesive material (4) to an entire first surface of said porous material(1), said applying done to said first surface prior to emplacing said topmost section;

placing at least one panel (10) incorporating at least one layer of non-porous material (metal - see page 1, second column, lines 14-26) upon a topmost one of said at least one layers of an adhesive material (4),

overlapping edges of said panel (10) with edges of any said panels placed adjacent thereto (see Figs. 2, 4, and 5), wherein said panels (10) completely cover said topmost layer of said adhesive material (4);

establishing a seal between all said overlapped edges (see either Fig. 4 and page 2, first column, lines 7-21 or Fig. 5 and page 2, first column, lines 22-31) ; and

emplacing at least one layer of material (2) comprising said topmost section upon each said panel (10) such that each said panel (10) is confined below said topmost section and above said topmost layer of adhesive (4),

wherein emplacing said panels, establishing a seal between said overlapped edges of said panels, as appropriate, and emplacing said topmost section completes implementation of said barrier (3).

The examiner notes that the recitation of an emplaced topmost section having a topmost surface "suitable for use by wheeled traffic" is a statement of intended use and as such the reference only need be capable of performing such intended use. In the present case, "wheeled traffic" could be anything such as a baby buggy and therefore, it is the examiner's position that Dahlander is capable of performing the intended use.

As to claim 2, Dahlander discloses the method of claim 1 as discussed above, and Dahlander also discloses that said barrier (sheet metal layer 3, preferably copper) employs non-porous material selected from the group consisting essentially of: a metal, a metal alloy, a steel alloy, a stainless steel, a composite material, a composite material containing at least some metal, and combinations thereof.

As to claim 3, Dahlander discloses the method of claim 1 as discussed above, and Dahlander also discloses that said barrier (3) employs non-porous material (metal, preferably copper) comprising at least in part at least one metal.

As to claim 4, Dahlander discloses the method of claim 1 as discussed above, and Dahlander also discloses that porous material (concrete 4) encompassing said barrier comprises at least in part concrete.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dahlander (U.S. Patent No. 2,036,123) in view of Bean et al. (U.S. Patent No. 6,286,279).

As to claim 5, Dahlander discloses the method of claim 4 as discussed above.

Dahlander fails to explicitly disclose that the step of employing said adhesive material comprises at least in part a thin set mortar at a thickness of about 6 mm (0.25 inch).

Bean et al. teaches the use of an adhesive layer (18) of a Portland cement-based adhesive to bond a steel foil (12) to concrete (C). Bean et al. does not explicitly disclose that the adhesive layer is about 6 mm (0.24 inch).

However, it is well settled that changes in size and/or proportion between the invention and the prior art do not constitute a patentable difference. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). Further, *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made of modify the method of implementing a barrier to fluid flow of Dahlander by replacing the adhesive of Dahlander with the Portland cement-based adhesive as taught by Bean et al. in order to form a bond between the concrete and metal that does not degrade in the presence of moisture and alkalinity, and to make the adhesive layer 6 mm (0.25 inches) thick would have constituted a further obvious expedient to one having ordinary skill in the art at the time the invention was made since it is well founded that merely changing dimensions is not unobvious (see *Brunswick Corporation v. Champion Spark Plug Company*, 216 USPQ 1 (CA 7 1982)).

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dahlander (U.S. Patent No. 2,036,123) in view of Burgess (U.S. Patent No. 1,986,999).

As to claim 6, Dahlander discloses the method of claim 1 as discussed above. Dahlander fails to explicitly disclose that the step of applying said topmost section is comprised at least in part of concrete at a thickness of about at least 2.5 cm (1.0 inch).

Burgess teaches a flooring structure in which corrugated metal plates (11) are overlapped (see at 15, 16 in Fig. 1) and a concrete layer (20) is then emplaced to form the floor surface. Burgess fails to explicitly disclose that the concrete layer is at least 2.5 cm (1.0 inch) thick.

However, it is well settled that changes in size and/or proportion between the invention and the prior art do not constitute a patentable difference. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). Further, *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made of modify the method of implementing a barrier to fluid flow of Dahlander by replacing the flooring material of Dahlander with a concrete layer as taught by Burgess in order to provide a sturdier wear surface, and to make the concrete layer 2.5 cm (1 inch) thick would have constituted a further obvious expedient to one having ordinary skill in the art at the time the invention was made since it is well founded

that merely changing dimensions is not unobvious (see *Brunswick Corporation v. Champion Spark Plug Company*, 216 USPQ 1 (CA 7 1982).

Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dahlander (U.S. Patent No. 2,036,123) in view of Schirmer (U.S. Patent No. 4,155,209).

As to claim 7, Dahlander discloses the method of claim 1 as discussed above. Dahlander fails to explicitly disclose that the step of establishing said seal is done at least in part by applying a continuous bead of at least one sealant along the entire length between each said overlapped edge, wherein said sealant remains flexible upon curing.

Schirmer discloses a fluid-sealed sheet metal joint wherein the step of establishing said seal is done at least in part by applying a continuous bead of at least one sealant along the entire length between each said overlapped edge, wherein said sealant remains flexible upon curing (see col. 3, liens. 18-49).

It would have been obvious to one of ordinary skill in the art at the time the invention was made of modify the method of implementing a barrier to fluid flow of Dahlander by replacing the sealant of Dahlander with the flexible RTV sealant taught by Schirmer in order to provide a waterproof joint that will remain so even after being subjected to numerous freeze and thaw cycles (see col. 1, lines 16-25).

As to claim 8, Dahlander in view of Schirmer discloses the method of claim 7 as discussed above, and Schirmer also discloses that a room temperature vulcanizing (RTV) sealant is employed as said at least one sealant.

Claims 9 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dahlander (U.S. Patent No. 2,036,123).

As to claim 9, Dahlander discloses the method of claim 1 as discussed above, and Dahlander also discloses that the step of employing at least one panel is comprised of employing at least one plate.

Dahlander fails to explicitly disclose that the at least one plate has a total thickness less than about 6 mm (0.25 inch).

However, it is well settled that changes in size and/or proportion between the invention and the prior art do not constitute a patentable difference. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). Further, *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal

Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Therefore, to make the at least one plate have a total thickness less than about 6 mm (0.25 inch) would have constituted an obvious expedient to one having ordinary skill in the art at the time the invention was made since it is well founded that merely changing dimensions is not unobvious (see *Brunswick Corporation v. Champion Spark Plug Company*, 216 USPQ 1 (CA 7 1982)).

As to claim 12, Dahlander discloses the method of claim 1 as discussed above, and Dahlander also discloses that the step of employing the at least one panel is comprised of employing at least one foil.

However, Dahlander fails to explicitly disclose that the least one foil has a thickness less than about 1 mm (4 mil).

However, it is well settled that changes in size and/or proportion between the invention and the prior art do not constitute a patentable difference. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not

establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). Further, *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Therefore, to make the at least one plate have a total thickness less than about 6 mm (0.25 inch) would have constituted an obvious expedient to one having ordinary skill in the art at the time the invention was made since it is well founded that merely changing dimensions is not unobvious (see *Brunswick Corporation v. Champion Spark Plug Company*, 216 USPQ 1 (CA 7 1982).

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Of interest are U.S. Patent No. 5,546,719 to Maiers et al. which discloses a waterproof decking method and apparatus, U.S. Patent No. 5,052,161 to Whitacre which discloses a tile application structure, U.S. Patent No. 3,900,102 to Hurst which discloses waterproofing means and method, U.S. Patent No. 5,286,318 to Sims et al. which discloses a method of forming EMI shielded enclosures, and U.S. Patent No. 5,137,764 to Doyle et al. which discloses a floor structure incorporating a vapor and gas barrier.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gay Ann Spahn whose telephone number is (571)-272-7731. The examiner can normally be reached on Monday through Thursday, 8:30 am to 7:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Heather C. Shackelford can be reached on (571)-272-7049. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Gay Ann Spahn, Patent Examiner
October 8, 2005



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